

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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|------------------------------|---|----------------------------|
| In the Matter of |) | File Number EB-02-PA-140 |
| |) | |
| FBS Wireless Corporation |) | NAL/Acct. No. 200232400007 |
| Licensee of Station WFBS(AM) |) | |
| Berwick, Pennsylvania |) | FRN 0006-7296-02 |
| |) | |

MEMORANDUM OPINION AND ORDER

Adopted: January 10, 2007**Released: January 12, 2007**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* (“*Order*”), we dismiss as untimely the petition for reconsideration (“petition”) filed on November 19, 2004, by FBS Wireless Corporation (“FBS”), licensee of radio station WFBS(AM), Berwick, Pennsylvania, and owner of that station’s antenna structure. FBS seeks reconsideration of a *Memorandum Opinion and Order* (“*MO&O*”)¹ in which the Enforcement Bureau (“Bureau”) denied a previous petition for reconsideration filed by FBS of a Bureau *Forfeiture Order*² which found FBS liable for a forfeiture in the amount of twenty thousand dollars (\$20,000) for repeated violation of Sections 17.4(a), 17.51(a), and 73.49 of the Commission’s Rules (“Rules”).³ The noted violations involve FBS’s failure to register and light the antenna structure for WFBS and to enclose the antenna structure within an effective locked fence. As discussed below, we dismiss FBS’s petition because it does not comply with the timeliness requirements of Section 405(a) of the Communications Act of 1934, as amended (“Act”),⁴ and Section 1.106(f) of the Rules,⁵ and is therefore procedurally defective.

II. BACKGROUND

2. On March 19, 2002, an agent from the Commission’s Philadelphia, Pennsylvania, Field Office (“Philadelphia Office”) inspected WFBS’s antenna structure. The station’s license then specified that the station’s antenna structure must exhibit red obstruction lighting at night. When the agent asked the president of FBS, to demonstrate the antenna structure’s red obstruction lighting, he responded that the red obstruction lighting had not been operational since FBS acquired the station in February 2000. The agent also observed that the gate to the fence surrounding the antenna structure was unlocked. In addition, the agent determined that the antenna structure was not registered. When the agent re-inspected the antenna structure on April 24, 2002, he found that the antenna structure was still unregistered and that

¹ *FBS Wireless Corporation*, 19 FCC Rcd 19477 (Enf. Bur. 2004).

² *FBS Wireless Corporation*, 18 FCC Rcd 21018 (Enf. Bur. 2003).

³ 47 C.F.R. §§ 17.4(a), 17.51(a), 73.49.

⁴ 47 U.S.C. § 405(a).

⁵ 47 C.F.R. § 1.106(f).

the gate to the fence surrounding the antenna structure was still unlocked.⁶

3. On May 20, 2002, the Philadelphia Office issued a Notice of Violation (“*NOV*”) to FBS for various violations of the Rules, including Sections 17.4(a), 17.51(a) and 73.49. The noted violations involved FBS’s failure to register and light the antenna structure for station WFBS and failure to enclose that antenna structure within an effective locked fence. In its response to the *NOV*, filed on June 4, 2002, FBS admitted that its antenna structure was unregistered and that the red obstruction lighting had been extinguished for approximately 10 years. However, FBS also stated that the height of the antenna “was in dispute” and “had been represented to us as 198 feet, not requiring ... illumination” In addition, FBS asserted that it had corrected the fencing violation.

4. On August 12, 2002, the Philadelphia Office issued FBS a *Notice of Apparent Liability for Forfeiture* (“*NAL*”)⁷ for a monetary forfeiture in the amount of twenty thousand dollars (\$20,000) for apparent willful and repeated violations of Sections 17.4(a), 17.51(a), and 73.49 of the Rules. FBS responded to the *NAL* on September 16, 2002 and supplemented that response on February 3, 2003, contesting the violations and seeking a reduction of the forfeiture amount. In the *Forfeiture Order*, released on October 20, 2003, the Bureau rejected FBS’s claims and concluded that, since FBS’s violations were repeated, it was unnecessary to determine whether they were also willful. On November 21, 2003, FBS filed a petition for reconsideration, seeking reduction of the forfeiture based on two new arguments. First, FBS argued that tower registration was impossible because the exact coordinates of the tower were not known. Second, FBS argued that the Commission’s failure to note outstanding violations at the time it originally approved the transfer of the antenna structure to FBS should excuse FBS from liability. In the *Memorandum Opinion and Order* released on October 18, 2004, the Bureau rejected the above arguments, denied the petition for reconsideration, and affirmed the issuance of the \$20,000 forfeiture. On November 19, 2004 FBS filed a second petition for reconsideration, this time seeking reduction of the forfeiture based solely on a claimed inability to pay.

III. DISCUSSION

5. Section 405 of the Communications Act of 1934, as amended (“Act”), requires that petitions for reconsideration of a Commission action or an action by delegated authority must be filed no later than 30 days after the action that is the subject of the appeal. Section 1.106(f) of the Rules, which requires petitions for reconsideration to be filed within 30 days of the date of the public notice of the final order, reflects that statutory mandate. In this case, public notice of the *Order* occurred on October 18, 2004, upon its release. The thirtieth day after October 18, 2004, was November 17, 2004.⁸ Thus to have been timely, any request for reconsideration was due to be filed with the Commission no later than November 17, 2004. FBS’s submission was filed November 19, 2004.⁹ FBS, therefore, did not timely file the petition for reconsideration. We, therefore, find that we have no jurisdiction to consider FBS’s

⁶ A subsequent check of the FCC’s Antenna Structure Registration data base indicates that FBS registered the antenna structure on September 16, 2003.

⁷ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200232400007 (Enf. Bur., Philadelphia Office, released Aug. 12, 2002).

⁸ Section 1.4(b) of the Rules, 47 C.F.R. § 1.4(b), specifies that the first full day after the date of public notice counts as day 1 for the purpose of calculating the filing deadline. In this case, calculating the 30-day filing deadline from a public notice date of October 18, 2004, begins with October 19, 2004 as the first of the permitted 30 days.

⁹ The petition for reconsideration was received at the FCC on November 19, 2004. Documents are considered to be filed on the date of receipt at the location designated by the Commission. 47 C.F.R. § 1.7.

petition for reconsideration and that it must be dismissed.¹⁰

IV. ORDERING CLAUSES

6. Accordingly, **IT IS ORDERED** that, pursuant to Section 405(a) of the Act and Section 1.106(f) of the Rules, FBS's petition for reconsideration **IS DISMISSED**.

7. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹¹ Payment of the forfeiture must be made by check, money order or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to the Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for full payment under an installment plan should be sent to: Associate Managing Director – Financial Operations, 445 12th Street, S.W., Room 1A625, Washington, D.C. 20554.¹²

8. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail, Return Receipt Requested, to FBS Wireless Corporation, 560 Willow Avenue, 2nd Floor, Lyndhurst, New Jersey 07071.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau

¹⁰ See *Reuters Ltd. v. FCC*, 781 F. 2d 946, 951 (D.C. Cir. 1986); *National Black Media Coalition v. FCC*, 760 F. 2d 1297, 1299-1300 (D.C. Cir. 1985, Scalia, J.) (Court of Appeals has no jurisdiction to consider an appeal from an FCC decision filed more than 30 days after the date of public notice, distinguishing *Gardner v. FCC*, 530 F. 2d 1086 (D.C. Cir. 1976); *Washington Broadcast Management Co., Inc.*, 15 FCC Rcd 6607 (2000); *Panola Broadcasting Co.*, 68 FCC 2d 533 (1978); *Paladen Communications, Inc. a/k/a CB Shop*, 21 FCC Rcd 9552 (Enf. Bur. 2006); and *Bay Broadcasting Corporation*, 15 FCC Rcd 23449 (Enf. Bur. 2000).

¹¹ 47 U.S.C. § 504(a).

¹² See 47 C.F.R. § 1.1914.